IN THE CASE OF

NEW HAMPSHIRE,

VS.

LOUISIANA.

IN THE SUPREME COURT OF THE UNITED STATES.

Can a State be Judicially Forced to Pay her Debts?

ARGUMENT BY B. J. SAGE.

NEW HAMPSHIRE *VS.* LOUISIANA.

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In considering questions involving the parties to, the obligations of, and the remedies on, government bonds, it must always be kept in mind that

One Party is Above—the Other Beneath the Law.

In every transaction of a person with a state, or with the association of states, these relative positions are maintained; one is subject to judicial coercion, while the other is not. Every federal or state bondholder contemplated this, and agreed to it. He can have no judicial aid to compel either the state or the united states to pay a bond. He must rely for his payment alone on the obligor's good faith. The alternative is war. This is plain common sense, and is the principle recognized by Mr. Webster in his celebrated Baring letter of 1839; and I know of no eminent publicist who ever thought otherwise.

Such contract consists of essential obligations and qualities, and is an entity, with a make-up and character established at its origin. Mere transfer from a private party to a state, cannot so change it, that rights of action will spring from it, which could not do so originally. Is such bond technically a chose in action? Surely the heart of it, in other words that which is bought and sold—the thing of value—is a government's promise—a sovereign's faith. Further on, I think we shall see clearly that there can be no judicial cognizance of it.

As the contention of the plaintiff strikes at the very quick of our union of States, and the involved "blessings of liberty," I trust to be excused for a careful and elaborate stating of facts, which are alike the history and the law of our polity. Our constitutions are the basis and the warrant of all governmental action. The great and sole purpose of them is to create, direct, limit, control, and, if need be, punish governmental agents. By such constitutions we test the correctness of the legislative, executive and judicial acts or conduct, of which governing consists.

Confining myself mainly to the federal constitution, I now propose to establish by proofs, some vital truths, which must always be taken as the foundation of argument on the great subject hereof. I do it most deferentially, to vindicate the constitution and its establishers, as well as to aid the bar and the courts in the settlement of the great questions before us. The facts I shall present are undisputed history; the constitutions and records of the country; the contemporaneous statements of the fathers, and the principles of Montesquieu, Vattel, Hume, Locke, Rutherforth, and the other great publicists who guided the fathers in their constitution-building work, and who, with the masters of language, gave the words used, definite, technical and fixed meanings.

I venture to state the following points in such mode as will indicate my contentions:

I. What is the general governing authority? It is not a nation in any sense; but it is "the united states." Each state is its own home government, and all the States associated are the federal. Each republic governs itself: The united republics govern themselves. "The people" are a republican—a self-governing people.

II. What—and where located—is the political will—the will that governs and remains uppermost; the will that establishes and administers government—the will of the people? It is in the original society, or commonwealth of people both "before and after a constitution is made" [James Wilson of Pa.;] single wills govern in home matters; joint wills in federal ones.

III.—Such wills are not subject to federal coercion while persons are. In other words, it is not "moral persons" called states, that are subject to governmental control, but natural persons—citizens or subjects.

IV. What is the source, and precise philosophical character of federal jurisdiction. Societies exercising their will through agents, is the answer. The people have no capacity to act politically, to establish government and confer jurisdiction, except as such societies. Sovereignty, which dwells in such societies, acting severally or jointly, manifests itself by three modes and agencies—legislative, executive and judicial. Each must do as told in writing; all are delegative and agential, and necessarily subordinate.

V. Of the obligations of State bonds, what is the precise character and extent? Good faith and honor form their sole basis. They and federal bonds are promises of the people in their political capacity, acting through governmental agencies. No right of action was contemplated; none springs from them; their sole basis is faith and honor.

VI. The bonds sued on give New Hampshire no right of action against Louisiana? Transferring them has not changed their character, and made actionable what was not so before. She is a party interposed to evade amendment XI of the constitution, and bring the controversy under Article III of the same, which provides for suits between States; and her success herein would nullify the former, and make all claims of persons against States actionable. The contract's core and soul being the plighted faith of the people, that is to say, of original and inherent power, or sovereignty, it can only be enforced by hostility. Suits between States must be confined *stricti juris* to cases arising from their original and legitimate relations, and their contiguity, intercourse or voluntary dealings, and not include feigned or made-up suits.

I.—THE STATES ARE THE GENERAL GOVERNING AUTHORITY.

That the States are the *local* governing authority is generally conceded; but, for

my argument, I need to prove that they are the *general* governing authority. All history shows and all the fathers say that the Federal constitution derives its entire life and legality from the separate but concurring wills of the said States, expressed in their ratifications. On this, Daniel Webster is conclusive, as follows: "Until the constitution was ratified by nine States, it was but a proposal—the mere draft of an instrument. It was like a deed drawn, but not executed; * * * it was inoperative paper; * * * it had no authority; it spoke no language."

And the constitution itself proves absolutely that it gets all its existence and validity from the States, for article VII declares that "the ratification of the conventions of nine States shall be sufficient for the establishment of this constitution between the States, so [i. e., by conventions] ratifying the same"—thus showing: 1. That it is "*ratification*," which is to be "sufficient for the *establishment*." 2. That "*States*" are to "*ratify*." And 3. That, therefore, the "STATES" are to ESTABLISH the constitution.

Each of such bodies has a mind—the collective and governing mind of the people. All governing is done by it. Such mind had no other dwelling-place, when the Union was formed, than the societies called States; and it has had no other since; and the operation of the original thirteen of such minds was necessarily functional—and not self-destructive—in jointly devising the constitution in "the convention of States" of 1787; in severally ratifying and establishing the said constitution; in separately electing their quotas of agents for the general governmental agency; and ever afterwards—jointly with their new associates—in governing their subjects as to general matters; and from time to time voting on proposed amendments.

Such functional action of the minds could not destroy the bodies, and make of them a unity—a nation. They survived for further functional work; and hence we find them characterized to day, in the constitution itself, as "the states in this union," and as "the united states" Moreover, the states are recognized as actors throughout the constitution; all federal grants of power and titles are to and from "the united states;" all legislators as well as all other functionaries are citizens of said states; every statute is enacted by the "states in congress assembled"—all of which prove that these bodies are unchanged by the "supreme law" they have established.

Nay more, that all amendments are to be adopted by the said states according to article V; and that the consent or will of a state as a political body, is recognized as continuing to exist, by the provision that "no state without its *consent* shall be deprived of its equal suffrage in the Senate" [Art. V] show independent and absolute proofs that the states survived, and that a nation did not supervene.

Hence we may say that the general governing authority is states, and not a nation, in any sense. Q. E. D.

II.—LET US NOW PRECISELY LOCATE RULING WILL.

Mind to investigate, reason, judge and will on all matters of ruling, must, in a self-governing people, dwell in such organizations of them as actually exist. We have no history of any original organizations of people, other than states—republican commonwealths. They do not act with a home mind for home affairs, and a general mind for general affairs, but with the same mind for all: often choosing their home and federal agents at the same moment, and through the same means.

The idea held by all the fathers, which runs, indeed, through all contemporaneous exposition, was that of Montesquieu, who said: Sovereignty in a democracy is exercised "by the suffrages of the people which are their will. *The sovereign's will is the sovereign himself.*" Therefore establishing and controlling suffrages, the instruments for determining the sovereign's will, are vital and fundamental to this form of government. [Esprit des Lois, 12.] This shows the State, the only society of people ever formed, to be the seat of sovereign will. And freedom and self-government require this collective will to be unconstrained and free from all but voluntary engagements, to govern the people, and protect them in their "blessings of liberty." In the constitution as it stood before amendment, this will was free from even judicial coercion at the suit of a citizen; but as the Federal Supreme Court claimed such jurisdiction, [See Chisholm vs. Georgia.] the eleventh amendment was made by the States to prevent it.

The Collective or Governing Mind.

To understand the question—much more to argue on it, a conception of the "moral person" which society is, must be had. The coming together of the people, in obedience to the social instinct with which God has endowed each human being, forms the body; and the inevitable result is the collective mind—the *aggregatio mentium*. It is of this we predicate governing will. This sentient and responsible being has, like all others, the *instinct* of self-preservation, which necessitates the RIGHT and the DUTY of self-preservation. Here is the collective life of the people—the only form it ever existed or acted in—a life given by the Creator. Doing away with such organisms, and making a nation of them, is destroying the collective life of the people; and, as societies must be sovereign, it is revolutionary and treasonable.

The law of being of a State is the social compact. The society's vital obligation is to govern and protect the members, while it is their vital obligation to obey and support and defend the said society. Here is exhibited the only sovereign, and the only tie of allegiance, that the nature of a republic admits of, and this is precisely the faith of Massachusetts—the champion of liberty and statehood. She consecrates it in her bill of rights, closing as follows: that therefore "we," the people of Massachusetts, "do solemnly and mutually agree with each other to form ourselves into a free, sovereign, and independent body-politic or State, by the name of—The commonwealth of Massachusetts." And they further declare that they forever "have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State."

Now we see where ruling will is; Q. E. D.

III.—ALL FEDERAL COERCION IS ON PERSONS—NONE ON STATES.

Such societies, each with mind and will, cannot be constrained in anywise against that will, no matter what it determines. It is the individual people, not the collective,

that must obey the law, and can be coerced to do so. To get a clear conception of the matter, let us illustrate the difference between the individual people and the collective people, as to status and power, by drawing four horizontal lines, the first of them to symbolize the collective people or society, which governs and protects, and the last, the people, as persons, who are governed and protected:

1. The sovereign people—society;

2. The constitution—fundamental law;

3. The governmental agency;

4. Persons and their belongings.

It is a mere truism that sovereignty is always uppermost, and that the other grades must remain as here collocated. If sovereignty be in the people, it must always be and remain in them as they are organized. They exist, and are capacited to act politically, only as societies. In their first capacity—above indicated—that is, their collective or corporate one, they govern, and can never be under the coercive means of the law, for the law is their will, and the means of enforcing it are their instrumentalities, while the persons composing the said society are subjects, and can be coerced. For example, New York governs New Yorkers, and Louisiana governs Louisianians. Obviously federal government, as well as state, is over what is symbolized by the fourth line, but not over what is symbolized by the first line.

What Say the Fathers?

The statement here made is not only common sense, but is the view of all the fathers without exception. Let us now quote them to show, not only that it was never intended to coerce States at all, but that it was never intended that they should be judicially coerced, even under the constitution as it stood before the eleventh amendment was added.

Said Ellsworth, in the ratifying convention of Connecticut: "This constitution does not attempt to coerce sovereign bodies—States in their political capacities." Madison said: "The idea of coercing States is visionary and fallacious." Hamilton said: "To coerce States is one of the maddest projects ever devised." Randolph, King, Ames, Davie, Spencer and others, characterised it as "war!"

And all the fathers said that the only coercion provided for was that of individuals. Said Rufus King, in the ratifying convention of Massachusetts: "Laws, to be effective, must not be laid on States, but individuals." Hamilton, Randolph, Ellsworth and others, said the same thing, [see Republic of Republics 401 et seq.] and the Federalist puts the matter beyond controversy, as follows: "*The great and radical vice* in the constitution of the existing Confederation is in the principle of legislation for *States* or governments in their corporate or collective capacities, and as contradistinguished from the *individuals* of whom they consist." [Fed. Art. XV.]

Could anything be more decisive? Legislation for the corporate or collective people, instead of the individuals they consist of, was "A GREAT AND RADICAL VICE," and was characteristic of the federacy that was to be supplanted by the new constitution. It was further declared to be a "solecism," and "*subversive of the order and ends of civil polity.*" Articles XV, XVI and XX. [Ibid.] are very forcible and conclusive, as well as *idem sonans* with Ellsworth, Madison and others, quoted just above.

Federal laws, then, were to be laid on persons, not on states, coercion of these, or indeed any control of them whatever, never being intended, or provided for. And all history—including the journal of the Convention, and the contemporaneous statements of the fathers, prove that it was most carefully guarded against—"*the mild and salutary coercion of the magistracy,*" being relied on as the means of effectuation.—[Ibid xx.]

We find, then, that the states are, in point of fact, above the government, or rather that they themselves are the government—the so-called government being an elective agency, delegative in character and power.

These are not mere doctrines, but facts, susceptible of most positive proof.

Even Judicial Coercion of States Reprobated.

Not only was legal coercion of states especially reprobated as tending to war—as belonging rather to the *jus gentium* than to civil polity—as inconsistent with the federal system, and the freedom of the commonwealths, and, therefore, sedulously guarded against, as any one will see by reading the Madison Debates; but judicial coercion of them was intended to be kept out of the system, as originally framed and promulgated by the federal convention.

No three fathers could speak more authoritatively than did James Madison, George Mason and John Marshall, in the Virginia ratifying convention, as to the meaning and intent of the constitution as originally established, and before the adoption of the eleventh amendment.

Said Madison: "It is not in the power of individuals to call any state into court," and he said further that the constitution "will be amended if under it, a state can be judicially coerced."

Said Mason: "Is the sovereignty of the state to be arraigned like a culprit or private offender? * * What is to be done if a judgment be obtained against a state? Will you issue a *fieri facias?* It would be ludicrous to say you could put the state's body in jail. How is the judgment, then, to be enforced?"

Said Marshall: "A state would not be called at the bar of a federal court. * * It is not rational to suppose that the sovereign power should be dragged before a court;" but I think he suggested an amendment to remove any possible doubt. It was explained that the jurisdiction over cases between a state and citizens of another state was to enable a state to recover a claim from a citizen of another state. [III Ell. Deb., 527, 533, 555.]

What Said the Federalist About It?

The Federalist [art. LXXXI.] clearly and conclusively shows the understanding of the original compact to be as herein stated, and at the same time shows the philosophy of it:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual, *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty

were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no rights of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

These great authorities, then, recognize the all-important facts, 1st. That the American *societies themselves were* the federal system and government, and 2d. That they were, even under the original constitution, and before the eleventh amendment, *above all manner of coercion.*

But I do not aim to impress, under this point, the truism that men cannot federally sue states, so much as to show that these organizations of people were to have self-governance in all things, and to act, for federal as well as home rule, through agents, which were ever to be subordinate to their wills.

Massachusetts, New York, Virginia *et als.* believed, felt and acted these vital truths, and strenuously at the moment, and in the act of ratification, insisted on further safeguards and restrictions, to prevent constructive consolidation, excessive government, and all possible attempts at constraint of their societal wills—the intention being, as will be seen, that the commonwealths should remain distinct in existence, sovereign in authority, and absolutely free from any kind of coercion. Just before his death, the great Webster declared that the states "never" intended "to consolidate themselves into one government," and "cease to be Maryland and Virginia, Massachusetts and Carolina," and he hoped "never to see the original idea departed from."—[See R. of R., 355.]

Massachusetts Herself Proposed Amendment XI.

Soon after the constitution went into effect, several suits were filed in federal courts against states—notably Van Staphorst vs. Maryland, Chisholm vs. Georgia, and Vassall vs. Massachusetts—the last being a suit by a refugee loyalist for his confiscated estates; and the federal supreme court decided (in Chisholm vs. Georgia) to hold jurisdiction of such cases.

At this juncture, Massachusetts, who had initiated, in her ratifying convention, the amendment (which became the tenth) declaring all powers not delegated to the united states to be reserved to the states; became aroused, and began an agitation, which spread through all the states, and finally resulted in the eleventh amendment, prohibiting federal jurisdiction of suits brought by citizens or aliens against states.

Let it be distinctly understood here that this doubtful judicial coercion—repudiated by the fathers, but claimed by the federal supreme court—was the only shadow or sign of federal control over the wills of our states that ever existed. And in the ensuing history we shall see that even that shadow was removed, and the states left the highest authority under heaven.

In volume I, page 231, Amory's Life of Gov. Sullivan, the subject and the action of Massachusetts thereon are most forcibly presented, as follows:

"The inconsistency of a sovereign state being liable to answer to the demands of citizens of other states, or subjects of foreign nations, presented itself forcibly to the minds of Richard Henry Lee, Samuel Adams and other advocates of state rights. When, soon after the Federal government was organized, Nicholas Van Staphorst brought suit against the state of Maryland in the Federal court, at its February term, 1791, the important consequences which must inevitably result from permitting such an encroachment upon state sovereignty were more generally recognized. In that same year Judge Sullivan prepared and published his 'Observations,' etc., to prove the necessity of amending the constitution in this particular."

Amory then proceeds to quote from said "Observations" as follows: "It seemed, however, generally agreed that the States, as States, were not liable to the civil process of the Supreme Judicial power of the Union, and no one pretended to deny that if the States were so liable, there was a consolidation of all the governments into one. There can be no suit against a nation by any practice yet known. Perhaps some may wish that nations might be compelled to do justice as well as individuals, but this is to no purpose. We may as well attempt to erect a temple beneath its own foundations, as to attempt to erect a government with coereive power over itself. No sovereign can consent to become a party before a foreign tribunal, and when wronged, his remedy lies in the power of his own nation."

Gov. Sullivan is then quoted as laying down the principle that the judicial and the legislative power must be coterminate, and says that if the States are under federal legislative and judicial, they must also be under federal executive authority, which would make "the republican form of government guaranteed to them by the constition nothing more than a form of police for a corporation," and "the legislative and executive powers of the several States nothing more than the power of making and executing by-laws," subject to "the sovereign pleasure of the United States," which is precisely the doctrine of the consolidationists of to-day, except that the "sovereign pleasure" they contend for, is that of a nation. He (Gov. S.) then adds:

"That this is clearly our situation if the judicial power of the United States extends to the several States as States, I believe will not be seriously contested. If this is our situation under the general government, then there is not, as the convention expresses it, a consolidation of our Union, but a consolidation of our governments, and one great and general system of government, embracing all the territory from the south line of Georgia to the north line of Massachusetts, considering and holding those which were lately Sovereign States as districts, under the National subordination of and amenable to that Government."

"Other suits," continues the author, "of the same nature of that above mentioned, were entertained in the Federal courts, and in the Spring of 1793, Judge William Cushing pronounced the opinion of the Supreme Court, that they were constitutional. [Chisholm vs. Georgia, 2 Dallas, 419.] In July of that year, three months before the death of Gov. Hancock, a bill in equity was filed in the Federal court against the State of Massachusetts, by William Vassall, a refugee loyalist, whose estate had been confiscated during the war; process being served on

the Governor and Attorney General. The Governor thereupon convened the legislature, to meet in September, and his last address was upon this subject. After full deliberation, the General Court passed the following resolve. on the 27th of September, 1793: 'Whereas, a decision has been had in the Supreme Judicial Court of the United States, that a State may be sued in the said court by a citizen of another State; which decision appears to have been grounded on the 2d section of the 3d article in the Constitution of the United States. Resolved that a power claimed, or which may be claimed, of compelling a State to be made defendant in any court of the United States, at the suit of an individual or individuals, is in the opinion of this Legislature unnecessary, and inexpedient, and in its exercise dangerous to the peace, safety, and independence of the several States, and repugnant to the first principles of a federal government. Therefore, resolved that the Senators from this State in Congress, be, and they hereby are, instructed, and the Representatives requested, to adopt the most speedy and effectual measures in their power, to obtain such amendments in the constitution of the United States, as will remove any clause, or article of the said constitution, which may be construed to imply a decision that a State is compelled to answer in any suit by an individual or individuals in any court of the United States."

Judicial Coercion of Ruling Will Prohibited.

The result of the great movement was that Congress obediently formulated the eleventh amendment, which was added to the constitution in 1798; and the Federal Supreme Court, in Hollingsworth vs. Virginia, considering that the amendment was "adopted by the constitutional number of *States*," (not the nation) unanimously decided that "*there could not be exercised any jurisdiction in any case, past or future, in which a state was sued by the citizens* of another state, or by citizens or subjects of any foreign state."

Undoubtedly the object of the amendment was to keep the political will which acts in all devising of government; in all establishing of government; and in all executing of government, just as it was before the constitution was made—'*free from every constraint but that which flows from the obligations of good faith.*" [Federalist, 81.]

IV.—THE SOURCE AND NATURE OF FEDERAL JURISDICTION.

This is matter of fact and philosophy. The organized self governing people—the societies called states, are the source. The people never had any possible capacity to act in government, to constitute agencies, and to confer on them jurisdiction, except as such societies. And they must act through "substitutes and agents," as all the fathers stated, and as common sense shows.

The General Government is an Agency.

A doubling of proof of the correctness of the foregoing contentions—a crucial argument, so to speak—is derived from the agential character, and the delegative authority of the general government. The people, as organised, constituted and intended this as an agency, they, as republics, or societies of people, being themselves the real government of the country, covering all territory and comprising all persons. The *personnel*, of the so-called general government, are chosen and deputed—to exercise the powers confided—by the said republics, from among their members or citizens. It cannot be otherwise than as stated, beeause all the powers in the said general government are written powers—"written," as the federal supreme court says, "by the mighty hand of the people"; and all the officials of the government are, as the constitution shows, and indeed says, "citizens [and consequently subjects] of different states," and chosen as subjects, deputies and agents, to represent their respective states in the federal agency. This is precisely Webster's admission in 1833, when he said: "*Sovereignty in government is unknown in North America.*" "THE PEOPLE ALONE ARE SOVEREIGN."

And no Power is in the Agency but Delegative,

as is shown by the constitution, which certainly is the measure of federal authority; for it specifies particularly every power that is to be used, and all of it is vested and entrusted power. Mark the language: "All legislative power herein *granted*, shall be *vested* in a congress of the united states." [Art. I.] "The executive power shall be *vested* in a president," etc. [Art. II.] "The judicial power * * shall be *vested*," etc. [Art. III.] Vested by whom? Obviously by the states whose *ratification* "shall be *sufficient* for the *establishment* of this *constitution.*" [Art. VII.] Here is the absolute end of doubt. The instrument is "*the constitution of* [that is to say, belonging to,] *the united states*"; and it, as well as all officials provided for, directed and controlled in it, and sworn to remain under and obey it, are in every possible respect—both individually and as the government—in strict subordination to the said instrument and its said makers—THE SOCIETIES *called* "*the people of the united states.*" Reversing this would, as Randolph said in the Virginia ratifying convention, "establish the doctrine that the *creature* could destroy the *creator*—the most absurd and ridiculous of all doctrines." [III Ell. Deb. 363.]

All jurisdiction, then, comes from societies of people. These coact, in government, only through federation and agency. The convention that devised the system, unanimously called it "the *federal* government of these states," and spoke of the constitution as "*delegating* such extensive *trust.*" What said Madison? "The federal and state governments are, in fact, but different agents and trustees of the people, instituted with different powers. * * The ultimate authority, wherever the derivative may be found—resides in the people alone" [Fed. 46] And, finally, he characterised our system as "*a government of a* FEDERAL *nature, consisting of* MANY COEQUAL SOVEREIGNTIES." [III Ell. Deb 381]

This is history, not doctrine; facts, not interpretation.

"The supreme law of the land."

In concluding this point as to the source and nature of federal jurisdiction, it is well to correct a gross error in the use and understanding of this phrase. When it is declared that this constitution, the pursuant laws, and the treaties shall be "the supreme law of the land," it is the constitution as a law, that is referred to, and not the governmental agency, or any official thereof, and it means just what it would mean among the states of Europe—the supreme law in all their respective realms, to be, as such, administered by their officers and obeyed by their subjects, but not dominating the

kings or sovereigns whose supreme law it is. So in our states. All the laws are theirs, and whenever any conflict is found between their respective domestic constitutions and statutes, and their federal ones, all officers, especially judges, are oath-bound to give the latter predominance. But this does not imply the absurdity that the agency, constituted, empowered, directed, controlled, and if need be, punished, by the said supreme law, can play the fantastic trick of lording it over its sovereigns and creators, whose subjects and chosen servants the said agency is composed of. This view of the supreme law clause is not only the common-sense one, but it is fully supported by the fathers. [See R of R p 94]

The phrase is the mere emphasis of a truism. All treaties or conventions among states or sovereigns since Adam, have overridden home laws in their respective realms, as their honor and faith would naturally require. If myself and several of my planting neighbors were, for our common defense and general welfare, to put our levees, drainage, fences, stock, commons, etc., under an agency, with jurisdiction for its purposes over our home forces, would we thereby be subjected?

The conclusion, then, of this point is that the *source* of federal jurisdiction is the commonwealths, and that its *nature* is agential, the courts being commissioned to speak justice for a will, which, in the nature of things, is above them and supreme, and which they can by no possibility rightfully dominate over and coerce. Q. E. D.

V.—THE NATURE AND EXTENT OF THE STATE'S OBLIGATION.

It is evident that the will referred to, being under no restraint, can do and undo its contracts, without ever being coerced, or even called to legal account; because a State is only bound by "the obligations of good faith." It is above the law and its coercions, said law being the expression of its own will. Hence the federal provision that no law shall be passed impairing the obligation of contracts, has no application here, especially as the law of the land, and the *status* of the obligor, are to be considered as a part of the said contract; so that subjection to the law, and to judicial coercion, were not obligations thereof, and were not contemplated by the parties. In short noncoercion was agreed to beforehand — the holder of a State bond, like the holder of a federal one, accepting the good faith of the obligor, as the obligation of the contract. As the great Hamilton deliberately wrote on this very subject, the State is "*free from every constraint but that which flows from the obligations of good faith*" [Fed. art. 81—quoted above.]

It is quite obvious that when the people, in their governing capacity, were declaring or agreeing that no laws should be passed impairing the obligation of contracts, they were contemplating the contracts of their subjects—the individual people; and not intending to place their own engagements under the law and its coercive forces, which they themselves decreed; for this would be, as Gov. Sullivan said, "like erecting a temple beneath its own foundations." [See quotation supra.]

So that even if the state has by law provided, in favor of the bondholder, a second time, that certain bonds shall be contracts, and a given tax be assessed, collected, and funded for their payment, we are, if the state change her will, and do not actually pass over to the creditor the payment, no farther along than at first; for the bonds, and the additional obligations, still remain contracts, one party to which is above law and jurisdiction, and "free from every constraint but that which flows from the obligations of good faith." [Fed. 81] *A fortiori* it is so, if the second so-called contract is mere law, or an *ex parte* action of the state's will, and an additional promise and pledge of sacred faith. The obligations involved in the law of 1874, the constitutional amendments, the assessing, collecting, and pledging of a tax for the bonds, are all *ex parte*, and without any of the essential elements of a contract, such as the bond involves.

A promise of payment, no matter how clear, specific, and solemn, or even a setting apart of funds in the treasury, is no assignment, or consummation of the contract, even in equity. Delivery, or at least the putting of the payment out of the promissor's, and in the promissee's control, is required. Such is the doctrine of Christmas vs. Russell, 14 Wallace, 69. How then can federal jurisdiction, by mandamus or injunction, in behalf of the bondholder, reach and dispose of funds in the state treasury? Now let us discuss another most important point.

What is the essential character of the contract?

The obligations of a contract are its substance, and they show its original, fixed and final character. And though it may be hard and unjust, an obligee, having invested his money in a government's good faith, cannot, on after thought, or by after action, change it to something else; nor can he bring it from above the law and its coercions, down beneath them.

Numerous additional authorities before me, might be cited or quoted on the general proposition that political government is exempt from suit, except with its permission; but I content myself with the two following to show that *faith and honor* must be the sole basis of the state's engagement. Webster's Baring letter of 1839 was based on this idea. Said he:

"The security for state loans is the plighted *faith* of the state, as a political community. It rests on the same basis as other contracts with established governments—the same basis for example as loans made by the united states, under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements. *** It has been said that the state cannot be sued on these bonds. But neither could the united states be sued, nor, as I suppose, the crown of England, in a like case."

And it may be well to say here that his memorial of 1819 recognized plighted faith as the only basis for the provisions of the federal compact, or "articles of union." [See Republic of Republics, appendix E]

One more authority will suffice. It is from the high Court of Chancery in England, in the case of Twycross vs. Dreyfus, where the court decides on appeal, "that the bonds [of Peru] were engagements of *honor* by the foreign Government," not enforceable even in her own (let alone English) courts, without her consent. [36 Law Times Reports, N. S. 752.]

That this was the faith of the fathers is

shown by their rejecting in the convention every plan of State coercion, and by the entire absence of Federal machinery or means of executing judgments against States; the intention evidently being, even in the few cases where controversies between States could be merged in Federal judgments, to leave compliance to the sense of honor, good faith and duty And this must be the case, even if the State has passed a law impairing the obligation of contracts, if the enforcing of the judgment would be against State will; for coercion, being hostile in character, is inconsistent as all the fathers said, with the plan of union, as it surely is with the *defense* and welfare of the states.

We have now ascertained, as the history and law of our system, and, of course, as our sacred rights:

That our general governing authority is States—republics—self-governing people, politically existing and acting only in bodies.

That the governing will—i. e. the sovereignty, or right of self-government of the people, is in States, no other bodies for governing mind to exist and act in, ever having been known to us.

That such bodies—that is to say, the collective people—are not, while the persons composing them are—subject to coercion.

That the only jurisdiction the Federal Government has, springs solely and exclusively from these States, any other being fraudulent, usurpatory and perjured.

That all coercion of a State's will was most carefully, studiedly, and completely prevented.

That the core of the contract sued on is the obligation of a government—a sovereign, the soul of it being plighted faith; and that it is not in character a *chose* in action, and subject to civil and peaceful process.

The purpose of stating so elaborately the foregoing historical facts, which are, *pro tanto*, the law of our polity—these facts being a few specimen rocks of the mountain of evidence of which that polity is composed—is to show the precise status and relations of the actors in the drama entitled:

New Hampshire vs. Louisiana.

This is the case: New Hampshire sues Louisiana in the federal supreme court, which has original jurisdiction over "controversies between two or more states" declaring [as assignee?] on debts contracted by the defendants, to citizens, who cannot sue her, and who agreed virtually and legally to take her plighted faith as the obligation of the contract; and demands of the said court judgment and execution against the said debtor state.

The very first idea is the startling one, that the court, whose existence and power come solely from the political people, can force the said political people to pay debts that all the world understood to be based alone on their honor and good faith.

The obligee understood and wished to evade this; contrived a dodge; sought an auxiliary; found New Hampshire; combined with her; and now they move the supreme tribunal of the commonwealths to act, *in fraudem legis*, with them, to do indirectly, with these bonds, what the constitution prohibits to be done directly.

If this test case be successful, New Hampshire, Massachusetts, Connecticut, New York and Pennsylvania, with their vast wealth, can join in buying at a discount the debts of all impoverished and delinquent commonwealths; and use the said supreme agent of justice, to grind to powder those of its creators and principals *who wickedly get poor* and in default! But if they have the will, they must go "outside the constition" for the way. Shall we ever see what Mason, Madison and Marshall regarded as an unutterable absurdity—the issuance of a fi. fa. against a state or the putting of her "body in jail?" [III Ell. Deb. 527, 533, 555.]

But New Hampshire is not a bona fide party,

as should be pleaded. She and the bondholders aim to evade 1st, The eleventh amendment, and 2d, the non-legal obligation of the contract. Her very statute condemns her, being "an act to protect citizens of this State, having claims against other States;" and providing that they may assign them to the State, and, on giving security for costs, have suit brought in the name of New Hampshire by her Attorney General. The provision for "controversies between two or more States," must refer to those that legitimately arise *between* states, out of their inter-state relations, from boundaries, or from their direct intercourse and dealings, and cannot cover claims or controversies originating between citizens and states. Otherwise Amendment XI would be a dead letter, for all citizens would assign their claims to their respective states, for suit under the above clause, and all private claims against commonwealths would be collectible against them through the Federal Supreme Court. Is not this the *reductio ad absurdum?*

New Hampshire can sue for herself, if she have a proper cause for action, but not for her citizens. Playing the *role* of *prochein ami*, good mother, "a hen gathering her chickens," or a sovereign protector, is alike unconstitutional, undignified, unfriendly and futile.

Surely courts will hold jurisdiction only over controversies which legitimately arise, and not factitious and made-up ones; and over real, and not fictitious or sham parties; and will not allow that to be done indirectly, and by subterfuge, which cannot be done directly. Undoubtedly the establishers of the constitution intended the above provision to cover jurisdiction which is *bona fide*, parties which are *bona fide*, and "controversies" which are *bona fide*.

It was to prevent just such an evasion or dodge as is attempted here, that Congress passed the 11th section of the judiciary act of 1789, which the Supreme Court made many decisions upon—all to the effect that the assignee of a chose in action, e. g., a note, bond, etc., could not sue in the federal court, where the assignor could not do so—a principle (if it be such) which should be fatal to New Hampshire's case; for the bondholders themselves could not sue the State.

This Suit is Unfriendly in Character.

There is deliberate forethought, if not malice prepense, in New Hampshire's recent statute, and the consequent movement before us; or, at all events, an unfriendliness and want of comity, inconsistent with any of the early sentiments and ideas of union. She and Louisiana have had no business intercourse or transactions; no contracts or consensual arrangements; and no interstate relations or interests, out of which could spring rights of action, or the "con-

troversies between two States" which were contemplated as requiring the judical judgment provided for. She sold no bonds and pledged no faith to New Hampshire; and even if she had, no action would lie. But this sovereign has advertised to the world for assignments of private claims against Louisiana, so that she can sue and crush her long oppressed sister, under a false and fraudulent use of the above provision: she has entered into a combination, if not a conspiracy, to use, in flagrant bad faith, the means of justice, designed to prescrve among ths states, the amity and mutual interest, which were alike the motive and tne basis of the constitution, and which cannot survive her success!

In Such Case Government Attacks Itself.

But there is, if possible, a more serious objection than any yet considered. This debt is owed by the people in their governing capacity, and it is the property and means they hold for governmental purposes, which are sought to be executed, and it is the same, whether we adopt the theory of state or national sovereignty. Suppose we admit, for argument's sake, the latter, namely: that *the States govern by virtue of the nation's delegative authority, having no status or rights but what the nation has given them.* As people therefore, they are integral parts of the nation, charged by it with the major portion of the functions of government, and holding from it, in trust, the public property and means consecrated to governmental purposes. Now we can see how absurd it would be for the judicial servitors of this great unity of government to be ordered to attack the other institutional parts of the same government, and seize and sell all the material means they hold in trust for performing their duty. So that the national theory, which both history and philosophy stamp as untrue and absurd, does not help the opposition at all. To give the government coercive power over itself, or any portion of itself—power to seize and sell its own means—power to mandamus or enjoin all its parts in detail, is like "attempting"—as Governor Sullivan aptly said—"to erect a temple beneath its own foundations".

And the principle I contend for, should seem to apply to means held and used, not as mere property for investment or profit, but for governmental purposes, by towns and counties. Note, that a state may, if she choose, govern from the centre, without municipal subdivisions and insiitutions. If, in such case, property for its governmental uses be exempt, why should it not be exempt, if held, for the same uses, by the *municipal subdivisions*, which the state creates and empowers, as *part of the organism and means of government?*

No means exist to make a state pay.

The people have never delegated to their judicial agency, either in constitution or statute, any authority or machinery whatever, to compel the political people to pay their public debts. Indeed, they, in establishing the constitution, acted in view of the oppressive debts they then owed, and sought to prevent the possibility of such coercion. All contemporaneous history proves this, especially that of the eleventh amendment, heretofore given. In fine we lack, as we probably ever will lack, the law and machinery for such coercion; for surely, as the constitution contains no such power, and prohibits all powers not delegated, no congress of states will ever dare to provide for a coercion of themselves severally. The power to do so was emphatically reprobated and rejected in the convention of 1787, as often as proposed, and was moreover carefully guarded against, so as to cover every possible case or attempt. [See Rep. of Rep. 212, *et seq*; 400 *et seq.*]

Municipal Bodies can be Coerced, but not States.

Counties and towns are under the limited judicial authority delegated by "the States in this Union" to their federal courts. And when such municipal bodies contract debts, the federal judges, in rendering and enforcing judgments, are acting out the will of their masters—the masters alike of municipalities and courts—the said "States in this Union," or "the United States." These masters, after establishing the constitution, must have continued to exist, to enforce it; to carry on the system; and, when proper, to amend it; and they necessarily remain above its coercions. All history, records and statements of the fathers support this, and denial is mere untruth. Indeed, as before stated, the concluding "article of union" alone is conclusive, providing, as it does, that nine ratifications, by conventions of States, "shall be sufficient for the *establishment* of this constitution between the States so [i. e. by conventions] ratifying [and, *ipso facto*, establishing] the same." It follows that the assertion of the *establishment* of this constitution," by any other political authority than the States, is absolutely untrue.

Necessarily, then, the wills of the commonwealths are above federal judicial coercion, while their municipal corporations are under it, being placed so by the said commonwealths, from whom all—absolutely all—coercive power springs.

And it is as much within the power and duty of Federal courts—so far as their jurisdiction goes—as it is of State courts, to coerce judicially, the municipal authorities and corporations of the State—by mandamus and injunction, for instance; for both classes of courts are doing the will of the State, according to her law.

But Such Writs Cannot Interfere with Discretion,

for where this is legislatively given, and an oath exacted for its proper use, mandamus or injunction would judicially vary, limit or hinder the exercise of judgment and conscience by the official in doing duty. In such case, these writs should seem to be judicial impertinence, if not perjured usurpation, and would show a house divided against itself—a government frustrating its own designs. For example, in the matter of taxation, which is always legislative, the exercise of all the faculties of the mind is required till the duty is done. Investigation, thought, reasoning, judgment and conscience are implied in the official discretion given, and it would be worse than ridiculous for judges to say: "Stop all your mental processes, and act [or refrain from doing so] according to this decree!" This would be judicial autocracy!

The federal supreme court substantially holds this view in 19 Wallace, 107 and 655, and

other cases, where it absolutely refuses to control the power of taxation given to municipalities, except where the state has legalized the given municipal tax, and where judicial power to coerce municipal compliance is invoked by proper parties. The court will also mandamus where there is lawful authority to contract municipal debt, together with power to tax at will for payment. And in all these cases it disregards as null any state law to the contrary, considering it as a law "impairing the obligation of contracts." 4 Wallace, 435, 535.

My reason for dwelling on the power of mandamusing municipal corporations, and trying to show that it ends where official discretion begins, or rather that it is confined to compelling ministerial duty, is to exhibit more forcibly the worse than absurdity of its application to a state, or her necessary instrumentalities and means of self-government.

Whether the right of government is *inherent* in states, or *given to them* by the nation, they always deposit legislative powers in one distinct institution, executive in another, and judicial in a third—all co ordinate. The functionaries chosen and empowered for one sphere cannot be controlled or interfered with in their sworn discretionary duties by those of another. The right of courts to mandamus or enjoin is legislatively given; so is sworn official discretion. Obviously the former must consist with the latter. Hence it is only where discretion ends that the right of mandamus begins. In other words, it is to be used in enforcing ministerial duty. Absurd is the idea of saying in the same breath to A: "Act out your discretion," and to B: "Make A do as you judge best." It is infinitely more absurd to mandamus or enjoin the *discretion, consent or will* of the sovereign mind—the collective mind of the people—the source of all institutional existence and authority, including the judiciary's; such consent or will being original and ultimate, and not given or limited by law.

It is certain, then, that whatever obligation the bonds contain, was contracted by the state's will—was based solely on her faith; that if the state has reversed that will, withdrawn her consent, or refused to pay, there is, and can be, no legal remedy; and that her agreement or law, that no state shall pass a law impairing the obligation of contracts, does not apply to the so-called contracts of the collective people as a state, or as "the states in this union," in their governing capacity, for governmental purposes—these being above the law, and based solely on faith and honor. Surely their own courts, acting by their will, cannot coerce them. There must be a top to everything. Sovereignty is the top of authority.

In Conclusion,

as this case involves vitally the commonwealths and their union, I beg leave to submit the following general and apposite views.

I have based myself throughout this argument on facts that cannot be disproved or innocently disputed. I might pile them up in mountains, while not a line of constitution, or record, or history, or contemporaneous exposition, supports the national theory, or throws any doubt on the supremacy of the States. Some *dicta* in our jurisprudence may be quoted against these contentions, but a world full of them will not outweigh the imperishable facts set forth. Nor will partisan or sectional or personal desire. The facts, entities and institutions shown by our history are the law and our rights. Being written indelibly on the tablets of the past, they—as the Federal Supreme Court have said—"cannot be recalled even by absolute power." The meanings and intent of the words used in our constitution, at the time of establishment, involve and protect our "blessings of liberty," as the preamble expresses it. The "well-known words must be taken in their well-known sense," says Webster. When the framers used them, they had definite technical and fixed meanings, according to all publicists, jurists and lexicographers, and they were not used in any doubtful or uncertain sense. And the misuses, preversions, falsifications, garblings and sophisms, our partisan and sectional annals are so fraught with, must be repudiated. And especially we must guard against being deceived or influenced by the changes of definitions of political and legal terms in Webster's Dictionary—edition of 1864. Sense and meaning and intent, in a word, is the thing of value—the kernel in the shuck—the gold in the ore! Meanings and intents are our sacred and precious inheritance!

It is amazing to me how any court, sworn to support the constitution—*can see and know* the following facts, to wit: that the states are named as political and acting entities, in the very first article of the instrument; that no change in them is any where provided for, or even hinted at; that their "ratifications," as the closing article declares, were to *establish* the system; that they separately ratified, and did thereby establish and ordain; that, in the constitution, they are characterized as "the states in this union," while their collective name or style therein is "the united states;" that all "the people of the united states" are described, and provided for, in the instrument, as "citizens of different states;" and that finally all—absolutely all—the power of the government still belongs to the said bodies of people, being delegated or trusted to their agency, to be used for their own defence and welfare—said agency being their own chosen citizens and subjects; and yet that such court *can fail to see and know and confess* that the said commonwealths are the be-all and the end-all of the whole system. Why did Hamilton say the states are "essential component parts of the union;" that it would be "political suicide" to consolidate them; that our system is a "confederacy;" and that the states are "the parties to the compact?" Why did Madison say, this is "a government of a federal nature, consisting of many coequal sovereignties?" and why did all the fathers, without exception, hold the same views? [Republic of Republics 42.]

If it was "political suicide" for the actors to consolidate themselves, it must be political murder and high treason for their federal agency to bring them into the condition, or under the yoke of a nation!

Presumption and Construction Always for States.

The federal courts, and especially the supreme one, have the highest and most sacred of all governmental duties, which is to defend sovereigns, and sovereign rights and

powers. It is through them that our self-governing sovereign societies speak and effectuate their judicial will. Courts instinctively say: "We must preserve them and their rights, especially their plenary right of government; for this is defending the people's blessings of liberty—the great aim and end of the constitution we administer."

And, thank God! the present court recognizes: 1. Indestructible states, self-joined. 2. The delegative and agential character of the federal government; and 3. The duty of always presuming and construing against the creature and grantee, and in favor of the creator and grantor—in other words, against delegative and for original power.

I will here quote the evidence of the third statement, not only as useful in this argument, but as an inspiration of hope to our almost despairing people as to the safety of their great inheritance—*the union of commonwealths.* The court lays it down as a fundamental rule that all grants in derogation of common right, are to be construed more strongly against the grantee and in favor of the sovereign. Charles River Bridge Co. vs. Warren Bridge Co., 11 Peters, 544; 4 Peters, 561; U. S. vs. Arredondo, 6 Peters, 738; 24 Howard, 302. And in Fertilizing Co. vs. Hyde Park, 7 Otto, 659, the court says: "Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court." This refers to vested rights, powers, franchises, property, etc. *A fortiori*, it applies to the far more precious and vital "common right" of liberty and self-government, where the grantee of powers is but a delegatee—an agent or servant, who gets all in trust, and nothing in full right; because "the people" ever hold the entire right of self-government, and never impart any ruling authority but powers, to be held in trust and used for them, and therefore to be taken *stricti juris.*

God save the commonwealths and their union!